(a) Petitioner was not in default in making payments under the contract because of an alleged practice or oral agreement that he was not required to pay for any portion of a car of shrimp until he had resold the entire car.

(b) The withdrawal by respondent of its anticipatory breach was not in good faith.

2. Whether a separate oral contract for the breading of shrimp alleged by petitioner was barred by the Illinois Statute of Frauds.

STATEMENT OF THE CASE.

This case is an action by respondent to recover for eight carloads of shrimp sold to petitioner. From October of 1950 until October of 1953, respondent, a Mexican shrimp packer, shipped substantially all of its production to petitioner. Relations between the parties were governed by a written contract which, as extended in 1952, provided, among other things, that petitioner was to report monthly the amounts of shrimp resold and simultaneously remit to respondent either 93% or 95% of the price which he obtained (R. 504, 511). It was 93% when petitioner financed the shipment and 95% when he did not (R. 511).

The 1952 extension also extended the operation of the basic contract until 1954 (R. 511). Otherwise, either party would have been free to terminate as of August 1953, by notice to the other prior to March 1, 1953 (R. 508).

Prior to March 1, 1953, respondent gave notice to petitioner that their contract would terminate "in accordance to its clauses" the following August (R. 512). This notice was sent on the advice of respondent's Mexico City attorneys (R. 124). However, respondent continued to per-

form under the contract and petitioner received, through July of 1953, the balance of respondent's production for the 1952-1953 shrimp season (R. 101). This season runs from some time in October to mid-July of the next year (R. 98, 311).

After receiving the termination notice, petitioner consistently claimed that, under the 1952 extension, the contract could not be terminated prior to 1954 (R. 512, 515-16). Respondent's position was that the notice of termination had been authorized and was legal (R. 139, 512, 515).

After sending the termination notice, respondent participated in the formation of a Mexican corporation called Exportadores Associados (EA) (R. 271). EA was owned by respondent and four other producers who represented about 20% of the production from the west coast of Mexico (R. 119, 120). Respondent owned 8% or 9% of the EA stock (R. 150). A wholly-owned American subsidiary, Crest Importing Company (Crest), was organized in June of 1953 (R. 211). As the District Court found (R. 702), respondent's plans with EA and Crest were "long range" and no commitments inconsistent with petitioner's contract were made by respondent (R. 170).

In April of 1953, petitioner heard rumors of the EA-Crest plans (R. 271). As stated in petitioner's statement (at p. 7), he sent his son (R. 327), Robert Appelbaum, to Mexico in June, and in July went himself. The general manager of respondent, Pinson (R. 97) then fully explained to petitioner the EA-Crest plan (R. 130). In August 1953, petitioner demanded that respondent send an authorized representative to Chicago to negotiate a settlement of the differences with respect to the termination notice (R. 515, 516).

In the meantime, in June and July 1953, petitioner had received the eight cars of shrimp for substantially all of which he has refused to pay (R. 15). A small payment on account of sales by respondent from these cars had been made in June, but nothing in July or August (R. 520).

In September of 1953, respondent's American attorney, Colienburg, advised that petitioner had been correct in his insistence that the contract between the parties had another year to run (R. 223). On the other hand, petitioner had admitted to an official of respondent that he had retained funds due respondent to compel respondent to send a representative to negotiate with him (R. 164).

Later in September, 1953, the parties, their attorneys and the President of Crest met in the petitioner's office and attempted to settle their differences. Petitioner testified that after he turned down an offer of $40,000 to step out of the contract, respondent's attorney said:

"Well then, there is nothing left for us to do. Then I suppose we will have to go through with the contract." And petitioner replied:

"That is all right with me, if I get assurance that they are going through with the contract * * * that they were sincere in their offer." (R. 265).

After the September meeting, respondent notified petitioner that its Board of Directors had confirmed the extension agreement and asked him to remit all sums due (R. 517). It was thus clear that respondent intended to go on with the contract and any anticipatory breach was unequivocally withdrawn. Petitioner replied he was gratified at the acknowledgment of responsibility under the contract but ignored the request for payment, saying:

"I am entitled to adequate security for your performance" (R. 518).

To respondent's next demand for payment, petitioner replied:

"We will continue to remit for cars as completely sold out in accordance with past practice so long as you live up to your agreement" (R. 519).

Respondent then, on October 20, 1953, declared the contract terminated because of petitioner's refusal to pay in accordance with its terms, and in December 1954 filed its complaint to recover for the eight carloads of shrimp.

REASONS FOR NOT GRANTING THE WRIT.

I.

No Ground For Certiorari Is Shown.

Entirely apart from the invalidity of petitioner's contentions, this case is clearly not appropriate for certiorari. No substantial or important federal question is presented and petitioner relies on no conflicting decisions of any courts, either state or federal. Although petitioner has claimed an infringement of his right to a jury trial under the Seventh Amendment (Petition, pp. 2, 14, 15 and 16), it is clear that the direction of a verdict—even if erroneous—does not present a constitutional question for this Court to consider. See *Galloway* v. *United States*, 319 U.S. 372, 373 (1943); *Baltimore & C. Line* v. *Redman*, 295 U.S. 654, 659 (1935); and dissent of Justice Holmes in *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 401 (1913). Furthermore, that both courts below have considered the facts and decided against petitioner should be determinative here. *Leach* v. *Burr*, 188 U.S. 510, 513 (1903); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

Applying well-settled principles of contract law, which petitioner does not question, both of the courts below properly held that petitioner's insistence that respondent's February, 1953, notice of termination was inoperative en-

abled respondent to withdraw it, obligated petitioner to perform in turn, and, when he refused to pay, respondent properly terminated the contract. *Roehm* v. *Horst*, 178 U.S. 1, 11 (1900); *Kentucky Natural Gas Corp.* v. *Indiana Gas & Chemical Corp.*, 129 F.2d 17, 19, 20 (C.A. 7, 1942, cert. den. 317 U.S. 678); *Reliance Cooperage Corp.* v. *Treat*, 195 F.2d 977, 981, 982 (C.A. 8, 1952).

II.

The Petition Fails to Show Any Error Below and Contains Major Misstatements of the Record.

A. As one reason for granting the writ, petitioner argues that the Court of Appeals, by affirming, puts its "imprimatur" on what petitioner claims was a misstatement of the law of evidence by the District Court (Petition, p. 11). However, the Court of Appeals did not even find it necessary to refer to this point and *obiter* of the District Court, even if erroneous, could hardly be the basis for certiorari.

But what petitioner actually is arguing that there was sufficient evidence to go to the jury on his claim that there was either an "oral understanading" or "agreement" (Petition, pp. 11, 12) or a "practice" (Petition, p. 16) that no payment was due for any part of a car until petitioner had resold the entire carload, and thus no payment was due upon respondent's demands in October 1953 because the eight cars delivered in June and July were not completely sold out.

Both courts below correctly held that the written contract and 1952 extension required a monthly accounting (Petition, p. 28; R. 703); thus, contrary to the assertion of petitioner (Petition, p. 11), any contemporaneous oral agreement to the contrary was not "in order" and, as the District Judge ruled (R. 704), whatever the "practice",

respondent on notice might properly insist, as it did, on payment in accordance with the contract.

Furthermore, that petitioner inconsistently urges the identical testimony (R. 118, 139, 147-48, 234, 235, 258) supports both his "oral agreement" and "practice" theories (Petition, pp. 12 and 16) cannot obscure the fact that neither is supported by the record. These unjustified arguments are obviously after-thoughts concocted in desperation since, when petitioner answered respondent's first request for payment (R. 517), justification for non-payment was not predicated on the theory that no payment was due because of past "practice" or an "oral agreement", but rather on the ground that petitioner felt himself "entitled to adequate security" (R. 518).

Petitioner's testimony is said to confirm "the oral agreement as to payment when cars were sold out" (Petition, p. 12). However, that testimony (R. 234, 235, 258) is barren of any reference whatsoever to the asserted "oral agreement" and does not even suggest that the "practice" referred to was not in accordance with the contract which required monthly remittances (R. 504). In any event, the testimony related to a time *prior* to the February, 1953* notice of termination *after* which it is clear that payments were made long before an entire car was resold. This is clearly shown in petitioner's last accounting and remittance which was made on June 30, 1953 and included a small

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* For example,

"Q. And prior to the receipt of the notice of cancellation from Reno in February of '53, what had been the practice with respect to remitting payment for the shrimps since 1952, the date which you started operating under the extension agreement?

"A. We remitted to the First National Bank as the cars were sold out and the money collected from the sales." (R. 258).

payment for sales from cars which were not completely sold out until many months later (R. 520, 566, 571, 573). The interpretation sought to be placed on petitioner's testimony is also directly contradicted by a letter written by petitioner to respondent on August 6, 1953, in which he stated:

". . . if you will check your records, I sincerely doubt if you will find more than a few cases where we failed to pay the bank for any car before it was completely sold out." (R. 528).

Petitioner also claims that the testimony of respondent's General Manager, Pinson (R. 118, 139, 147-48), supports his claim of a "practice" or "understanding" (Petition, pp. 11, 12, 13, 15, 16). Petitioner does not quote even a portion of this testimony because, as appears from the pages cited, it consists of affirmative responses to various obscure questions not one of which even suggested a "practice" of payment at variance with the contract. Nor was there a single question addressed to Pinson regarding the "oral agreement" referred to by petitioner. However, when details regarding payment were sought, Pinson said "I don't remember" (R. 148). This is not surprising since, as petitioner himself testified, Pinson was only concerned with the "physical delivery" of shrimp (R. 247, 248).

B. Petitioner's argument that there was sufficient evidence of respondent's "bad faith" in withdrawing its anticipatory breach to present a jury question (Petition, p. 16) rests on four important misstatements of the record.

1. Attempting to show that respondent did not intend to perform, petitioner claims that contracts in Spanish were prepared in July 1953, whereby respondent bound itself to deliver to EA for the 1953-54 season (Petition,

pp. 17, 19). However, the testimony, even that relied on by petitioner, is plain that respondent did not so bind itself (R. 120-21, 151-53, 214-16), and was not even mentioned in the so-called Spanish contract (R. 215, 216).

2. Although it is not clear how it would relate to petitioner's "bad faith" argument, even if true, he asserts that in October 1953 respondent "tersely advised petitioner, without any preliminary discussions, that it had ex parte decided that the 'contract remains in full force and vigor • • •'" (Petition, p. 18). This, of course, is false since there were extensive discussions between the parties in September 1953 and respondent then, on the advice of counsel, clearly stated it would go on with the contract (*supra*, p. 4, Petition, pp. 7, 8).

3. Crucial to petitioner's "bad faith" claims is the unsupportable assertion that Pinson, the General Manager of respondent "obviously controlled" the boards of directors of both respondent and Crest (Petition, p. 19). However, the undisputed evidence with respect to respondent is that the Comptroller General of Nacional Financiera, which owned 75% of respondent's stock (R. 162), was handling respondent's affairs (R. 328), the 1952 extension agreement came to being despite Pinson's objections (R. 129), and he ceased to be a director of respondent four days before the contract with petitioner was finally terminated (R. 578). With respect to Crest, the facts are that although Pinson bore the title of Chairman of the Board, the function of this official was merely to preside at meetings of the Board (R. 217), and Willis, the President and active executive of Crest, did not even know until the trial that the office of Chairman of the Board existed (R. 217).

4. The final and most flagrant misrepresentation of petitioner in support of his unfounded claim of "bad faith"

is the statement that respondent started to ship to Crest the day before it declared a breach for petitioner's failure to pay (Petition, p. 20). Here petitioner simply changes the date of respondent's termination wire of October 20 to October 21! Although no date appears on the exhibit itself (R. 519), it is apparent from petitioner's answering wire (R. 542), repeated statements by his counsel at the trial (R. 461, 474, 478, 482) and his petition (p. 9) that the correct date is October 20.

These gross inaccuracies are inexcusable and would justify dismissal of the petition (Rule 23(4)).

C. Petitioner also claims, on the basis of his "Spanish contract" theory, that it was apparently impossible for respondent to perform and that the Court of Appeals, by not adopting this theory, "overruled" the Restatement of Contracts §318, p. 478 (Petition, p. 21). This argument ignores the findings of both courts below (Petition, p. 28, R. 702) that there was no evidence respondent was a party to any such contract and overlooks the rule that apparent impossibility is merely a form of anticipatory breach subject to withdrawal (Restatement of Contracts §318, p. 475).

D. The argument of petitioner with respect to the Illinois Statute of Frauds point (Petition, pp. 20, 21) merely raises a question of Illinois law and advances the untenable proposition that a provision temporarily suspending performance upon a certain contingency of a contract of more than a year's duration shows a possibility of termination within a year.

In any event, the District Court, in dismissing this counterclaim, also ruled there was not sufficient evidence to establish the existence of the alleged oral contract R. 400-401).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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